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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 ROGER L. DAVY,

Civil No. 08-37-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,

14 Defendant.

15 _____
16 H. Peter Evans
17 9900 SW Greenburg Road
Columbia Business Center, Suite 235
Portland, Oregon 97223
Attorney for plaintiff

18 Karin Immergut
19 United States Attorney
District of Oregon
20 Britannia Hobbs
Assistant United States Attorney
21 1000 S.W. Third Avenue
Portland, Oregon 97204-2902

22 Kathryn A. Miller
23 Special Assistant U.S. Attorney
Social Security Administration
24 701 Fifth Avenue, Suite 2900 M/S 901
Seattle, Washington 98104-7075
25 Attorneys for defendant

26 AIKEN, Judge:

27 Claimant, Roger Davy, brings this action pursuant to the
28 Social Security Act (the Act), 42 U.S.C. §§ 405(g) and

1 1383(c)(3), to obtain judicial review of a final decision of the
2 Commissioner denying his application for disability insurance
3 benefits under Title II of the Act. Defendant moves to dismiss
4 alleging failure to exhaust administrative appeal remedies
5 regarding plaintiff's claim for benefits. Defendant's motion is
6 denied.

7 **PROCEDURAL BACKGROUND**

8 On January 25, 2006, plaintiff filed an application for a
9 period of disability and disability insurance benefits, which was
10 denied initially and upon reconsideration. On November 9, 2006,
11 defendant alleges that it issued a notice of reconsideration,
12 informing plaintiff that he could appeal and request a hearing
13 within sixty days from the date of the notice. On January 18,
14 2007, plaintiff's counsel submitted a memo to the Social Security
15 Administration (SSA) requesting the status of plaintiff's claim.
16 By faxed memorandum in either January or February 2007, defendant
17 informed plaintiff's counsel that plaintiff's claim had been
18 denied and that if he appealed the denial, he would need to
19 include a statement explaining why the appeal was late. Nearly
20 three months later, on May 2, 2007, plaintiff's counsel filed a
21 request for a hearing stating he missed the deadline to request
22 a hearing because he did not receive the reconsideration denial
23 notification dated November 9, 2006. Plaintiff's counsel also
24 stated that he faxed a request for a status report to the
25 district office on January 18, 2007, and did not receive a
26 response.

27 On June 28, 2007, an Administrative Law Judge (ALJ) issued
28 an order dismissing plaintiff's request for a hearing because he

1 did not find good cause for the late filing under the standards
2 set forth in 20 C.F.R. § 404.911. On July 5, 2007, plaintiff
3 then filed a request for review with a statement of good cause.
4 On November 30, 2007, the Appeals Council affirmed the ALJ's
5 decision and denied plaintiff's request for review of this
6 dismissal.

7 DISCUSSION

8 There is no dispute that the exclusive jurisdictional basis
9 for judicial review of cases arising under the Act is 42 U.S.C.
10 § 405(g), which provides that any individual, after any final
11 decision by the SSA Commissioner, may obtain a review of the
12 decision by a civil action commenced within sixty days after the
13 mailing to him of notice of such decision "or within such further
14 time as the Commissioner of Social Security may allow." Id.
15 Also, "[a]bsent a waiver, sovereign immunity shields the Federal
16 Government and its agencies from suit." Federal Deposit
17 Insurance Corp. v. Meyer, 510 U.S. 471, 475 (1994).

18 The SSA regulations provide that a claimant must complete
19 a four step administrative review process to obtain a judicially
20 reviewable final decision. 20 C.F.R. § 404.900(a). If the
21 claimant fails to pursue administrative appeal rights, the
22 administrative determination or decision becomes binding. 20
23 C.F.R. §§ 404.905, 404.921, 404.955, 404.981. The regulations
24 provide that an individual claiming entitlement to benefits first
25 receives an initial determination. 20 C.F.R. § 404.902. If
26 dissatisfied with this determination, the claimant may ask for
27 reconsideration. 20 C.F.R. § 404.907. If dissatisfied with the
28 reconsidered determination, the claimant may request a hearing

1 before an ALJ. 20 C.F.R. § 404.929. If the claimant is
2 dissatisfied with the ALJ's hearing decision, the claimant may
3 request that the Appeals Council review the decision. 20 C.F.R.
4 § 404.967. The Appeals Council may deny the request for review
5 and allow the ALJ's decision to stand as the final decision of
6 the Commissioner. 20 C.F.R. § 404.981. The Appeals Council may
7 also grant the request for review and issue its own decision.
8 Id. Regardless, the claimant may then seek judicial review of
9 the Commissioner's final decision by filing an action in federal
10 district court within sixty days after receiving notice of the
11 Appeals Council's decision. Id., 20 C.F.R. § 422.210. Upon a
12 showing of good cause, however, the Commissioner can extend the
13 time for seeking review. See 20 C.F.R. §§ 404.909(b), 404.911,
14 404.933(c), 404.968(b), 404.982.

15 The defendant contends that because plaintiff failed to
16 exhaust administrative appeals remedies, he did not obtain a
17 judicially reviewable "final decision" and therefore his
18 complaint seeking review must be dismissed. The plaintiff
19 asserts that the ALJ erred by dismissing plaintiff's request for
20 a hearing when plaintiff's lack of notice establishes "good
21 cause" for plaintiff's untimely request. Title 20 C.F.R.
22 § 404.933(c) provides that if a claimant shows "good cause for
23 missing the deadline, the time period will be extended." To
24 determine whether good cause exists, the agency looks to 20
25 C.F.R. § 404.911. That section explains:

26 (a) In determining whether you have shown that you
27 had good cause for missing a deadline to request
review we consider

28 (1) What circumstances kept you from making the

1 request on time;

2 . . .

3 (b) Examples of circumstances where good cause may
4 exist include, but are not limited to, the
following situations:

5 . . .

6 (7) You did not receive notice of the determination
7 or decision.

8 Here, plaintiff relies on "uncontroverted evidence" that neither
9 plaintiff's attorney nor plaintiff received the November 9, 2006,
10 reconsideration denial notice, nor did they receive the January
11 or February 2007, faxed response from SSA. Plaintiff relies on
12 the fact that plaintiff's counsel called the SSA in April 2007,
13 to inquire again about the status of plaintiff's reconsideration
14 request, and reasons that there would have been no reason to call
15 the SSA about the reconsideration status if plaintiff's counsel
16 had already received notice of the reconsideration denial.

17 Defendant asserts that regardless, the Commissioner's
18 ruling denying additional time is not subject to judicial review.
19 The Ninth Circuit has held that "permitting claimants to obtain
20 judicial review of denials of their requests for extensions of
21 time would frustrate Congress' intent to forestall belated
22 litigation of stale claims." Matlock v. Sullivan, 908 F.2d 492,
23 494 (9th Cir. 1990). The regulations specifically provide that a
24 ruling denying a request to extend a time period for seeking
25 review is not an "initial determination" subject to the
26 administrative appeals process and ultimately to judicial review.
27 See 20 C.F.R. § 404.903(j). A ruling denying additional time is
28 similar to a ruling refusing to reopen a prior application, which

1 the regulations also specify is not an "initial determination,"
2 20 C.F.R. § 404.903(1), and which the Supreme Court has held is
3 ordinarily not subject to judicial review. Califano v. Sanders,
4 430 U.S. 99, 107-09 (1977). The defendant argues that while the
5 agency affords claimants an opportunity to seek an extension of
6 time after missing a filing deadline, Sanders establishes that,
7 absent a colorable constitutional claim, a ruling denying such a
8 request is not subject to judicial review. Id. at 108. Sanders
9 holds: "Congress' determination to limit judicial review to the
10 original decision denying benefits is a policy choice obviously
11 designed to forestall repetitive or belated litigation of stale
12 eligibility claims. Our duty, of course, is to respect that
13 choice." Id.

14 Plaintiff maintains that this doctrine is inapplicable
15 because the ALJ's affirmance of the denial of a hearing
16 constitutes a "hearing" and therefore affords this court
17 jurisdiction. Plaintiff asserts that the Commissioner violated
18 his own regulations by denying him a hearing when there was "good
19 cause" for the late filing of the request for a hearing. The
20 good cause alleged by plaintiff was plaintiff's failure to
21 receive a copy of the reconsideration denial notice from the SSA.
22 20 C.F. R. § 404.911. Subsequent to the Ninth Circuit's decision
23 in Matlock, in 2000, the Ninth Circuit recognized that the
24 Commissioner should not foreclose judicial review by denying a
25 hearing, particularly when, as here, the denial is contrary to
26 the Commissioners's own regulations. McNatt v. Apfel, 201 F.3d

1 1084 (9th Cir. 2000).¹ In McNatt, after the claimant was denied
 2 a hearing, and the district court held that because no hearing
 3 took place, it had no jurisdiction to hear the appeal, the court
 4 held that a "hearing," as used in § 405(g) "has a broader
 5 meaning." Id. at 1087. The court reasoned:

6 The hearing requirement of § 405(g) is intended to
 7 ensure that claimants do not bypass the administrative
 8 procedure established to resolve their claims. . . .
 9 Accordingly, this court has held that a claimant
 10 who simply refuses to attend a hearing, either
 11 personally or through counsel, is not entitled to
 12 judicial review of a dismissal for failure to attend.
 13 However, it does not follow that because a claimant
 14 who refuses to participate in a hearing forfeits judicial
 15 review, a claimant who appears at a scheduled hearing
 16 through counsel and seeks a continuance also forfeits
 17 review. We believe that '[i]t would be curious
 18 indeed if the Secretary could foreclose judicial review,
 19 for whatever reason, by merely denying the claimant
 20 a hearing,' and that '[t]his concern is heightened
 21 where, as here, the claimant alleges that the
 22 agency denied him a hearing in violation of its own
 23 regulations.' Accordingly, we hold that when a
 24 claimant has appeared before the ALJ and sought a
 25 continuance of his or her hearing, and when the ALJ's
 26 decision denying the claim is final except for
 27 modification or reversal on appeal, claimant has had
 28 a hearing within the meaning of § 405(g). We therefore
 conclude that [plaintiff] is seeking judicial review
 of a 'final decision . . . made after a hearing,'
 and that the district court had jurisdiction to
 review the decision of the ALJ.

20 Id. (internal citations omitted).

21 The situation is similar here. Plaintiff was denied a
 22 hearing and defendant argued that plaintiff had no right to
 23 judicial review, despite the fact that the denial of a hearing
 24 was contrary to the Commissioner's regulations. In McNatt, the
 25 court was specifically concerned that: "[t]he hearing requirement
 26 of § 405(g) is intended to ensure that claimants do not bypass

28 ¹ See also, Evans v. Chater 110 F.3d 1480 (9th Cir. 1997)
 (distinguishing Matlock, supra).

1 the administrative procedure established to resolve their
2 claims." Id. Here, like McNatt, there was no attempt to bypass
3 the administrative procedure. Therefore, relying on the Ninth
4 Circuit's reasoning underlying McNatt, I find that when the ALJ
5 denied plaintiff's right to a hearing based upon the alleged
6 absence of "good cause," despite a regulation indicating that a
7 lack of notice suffices for good cause, the ALJ effectively
8 afforded plaintiff a "hearing" for the purpose of establishing
9 this court's jurisdiction pursuant to 42 U.S.C. § 405.

10 **CONCLUSION**

11 Defendant's motion to dismiss based on lack of subject
12 matter jurisdiction (doc. 11) is denied.

13 IT IS SO ORDERED.

14 Dated this 17 day of September 2008.

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18 /s/ Ann Aiken

19 Ann Aiken
20 United States District Judge
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